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No. 1066

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

MASSACHUSETTS BONDING & INSURANCE COMPANY,
Petitioner

vs.

MRS. E. S. MASSEY ET AL.,
Respondents

BRIEF OF RESPONDENTS

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E. Duncan & Co., Brief Printers, Dallas

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BRIEF OF RESPONDENTS

May it Please the Court:

In reply to the petition of the Massachusetts Bonding & Insurance Company for a writ of certiorari in the above entitled and numbered cause and the brief in support thereof the respondents respectfully present to this Honorable Court the following:

STATEMENT OF THE CASE

On behalf of the respondents it is desired to set forth that this is a suit for workman's compensation insurance

under the Workmen's Compensation Act of Texas. On the trial in the District Court the cause was submitted to a jury and resulted in a verdict and judgment for the respondents. Said judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit (123 Fed. 2d 447; R. 166). Motion for rehearing was denied January 12, 1942 (R. 181). Respondents alleged that injuries received in the course of employment contributed to and brought about the death of E. S. Massey, an employee of the Royal Oil & Gas Corporation. Apparently the only controversy hinges upon whether injuries received by the said E. S. Massey in the course of his employment contributed to his death, or heart failure was the sole cause of his death. The petitioner contends that the decision in this cause is repugnant to the Workmen's Compensation Act of Texas, contrary to the decisions of the Supreme Court of Texas, and in conflict with decisions of the Circuit Courts of Appeals. Respondents represent that the decision is exactly in accord with said Workmen's Compensation Act of Texas and in complete harmony with the decisions of the Circuit Courts of Appeals, the Supreme Court of Texas, and the Courts of Civil Appeals of Texas. The essence of the legal situation herein presented seems to be to the effect that the petitioner claims: (1) that the evidence is not sufficient to sustain the verdict and judgment; and (2) that certain evidence was not admissible and should not have been permitted to go to the jury. The respondents take the position: (1) that the evidence is sufficient to sustain the verdict and judgment; (2) that the evidence of which com-

plaint is made was admissible; and (3) that no proper and timely objection was made to said evidence.

SUMMARY OF ARGUMENT

In accordance with said legal situation herein the respondents respectfully present for the consideration of the Court the following points, to-wit:

I.

The evidence is sufficient to sustain the verdict.

II.

The evidence of which complaint is made was admissible.

III.

No proper and timely objection was made to said evidence.

ARGUMENT AND AUTHORITIES

I.

The evidence is sufficient to sustain the verdict.

In view of the outstanding opinions announced by the Federal Courts and by the State Courts of Texas to the effect that a verdict of a jury will not be disturbed if there is any competent evidence to sustain said verdict, the re-

spondents will here attempt only a short summary of the situation presented in this case. We think we are fully justified in saying that the evidence in this cause shows that E. S. Massey, the deceased employee, was a man of robust appearance, strong and capable, with every evidence and appearance of good health until August 31, 1939, and that he spent that day working in the hot sun at tasks which required sufficient exertion to produce a strain upon his heart. In the light of the evidence it certainly appears that he had been afflicted with heart disease for some considerable time, although such affliction was unknown. During the work on August 31, 1939 Mr. Massey found it necessary to stop and rest, which was contrary to his previous habits when engaged in the performance of the duties of his employment. At the close of that day's work Mr. Massey made the complaint of being unusually weary and during the ensuing few days suffered from rather severe heart attacks and discomfort. It further appears that Mr. Massey was treated for his heart condition, a part of said treatment being a few days confinement to the hospital, followed by several days of almost complete rest and relaxation. Mr. Massey returned to light duties about October 15, 1939, and about a month later put in a rather trying and strenuous day supervising and assisting in the installation of a cooler at his place of employment, following which he suffered from weariness and discomfort. The evidence shows that from and after the instances of August 31, 1939 and of the installation of said cooler Mr. Massey tired easily and rested more frequently than had been his

custom. Then early on the morning of November 28, 1939 it is shown that the engine which furnished the power for the operation of the oil lease went dead sometime before daylight, and that Mr. Massey in the performance of his duties went out to the powerhouse where the engine was located and worked until about one or one-thirty in the afternoon; that he then went to the nearby town of Archer City, received a letter containing instructions to put a new head on the engine at the lease, ate his breakfast and luncheon all in one meal, proceeded to Wichita Falls to get said head for the engine, returned to Archer City, arranged for the assistance of a helper, and that the two of them continued their work until nearly midnight; that early on the morning of November 29, 1939, the engine having stopped again, Mr. Massey returned to work and worked until around eleven o'clock that morning; that Mr. Massey then came to the house to take off his wet clothes and remained in the house about ten or fifteen minutes, then went out to the garage to go see about the oil tanks on the lease and a few minutes thereafter was found dead by the side of the car in the garage. The witness, Dr. William L. Powers, who had been Mr. Massey's physician since a short while after the incident of August 31, 1939, testified that Mr. Massey had a rather severe form of heart disease, that he had recommended absolute bed rest and the use of various drugs for his heart, and that the treatment for his particular type of heart disease consisted principally of bed rest and the use of drugs (R. 121). Dr. Powers further testified that any degree of activity steps up the heart rate to a

certain extent, that is the reason we put a man at bed rest when he has a heart disease, to slow the heart down and give his heart a chance to rest, and that condition would be increased by any increased activity or exertion; that Mr. Massey showed definite evidence of clinical improvement during that period of time (R. 121). Dr. Powers further testified as follows: "I feel this way about that, that work of that nature, if it involves any exertion or any interference with rest, that it would have a definite bearing on, certainly impairing that man's heart further. I feel that anything that interferes or puts an extra load on the heart, which exertion or manual labor or work of any nature would do, would certainly be a contributing factor to a patient's heart failure." (R. 124).

The above would appear to be a rather brief summary of the evidence relevant to this man's injuries and death. Other portions of the evidence tend to strengthen and emphasize the relation between Mr. Massey's injuries in his employment and his consequent death. However, such brief summary, or even a casual glance at the evidence in this cause, should be amply sufficient to bring it within the purview of the rules laid down by the Federal Courts as well as the Texas Courts. The decisions herewith cited clearly and unmistakably announce the rule that a trial court is only authorized to instruct the jury to return a directed verdict when there is no evidence of probative force in support of the contention of the party against whom the verdict is directed. If the evidence upon the con-

trolling controverted issues is such that reasonable minds could differ in its construction and application a directed verdict should not be given. It is also announced by said courts as the settled law that a compensation claimant, even though he was partially incapacitated from disease prior to the time he received an injury for which compensation is sought, is nevertheless entitled to recover compensation for the full amount which he was entitled to receive without reference to the disease; that whatever the physical condition of an individual may be, if it is such that it requires some physical exertion or strain to cause the injury, such injury is accidental and compensable; and that if the employment is a contributing cause of the injury, a claimant is entitled to recover.

The position assumed by the petitioner would seem more ingenious than applicable. In *Fidelity and Casualty Company of New York vs. Neas*, 93 Fed. 2nd, 137, it was held that a workman who climbed two poles in the course of his employment and died from cerebral hemorrhage was entitled to recover compensation for such injury, and that the Texas Workmen's Compensation Law does not require that an accident in the work, in the sense of something that unexpectedly caused unusual exertion or overstrain, occur in order to authorize compensation. In *Hartford Accident and Indemnity Company v. Jones*, 80 Fed. 2nd, 680, the court held that the evidence was sufficient to sustain a finding to the effect that the employee had sustained a compensable injury, and that if there is a real injury to an employee,

the background of his peculiarities will not defeat recovery of compensation. In *Brodtmann v. Zurich Accident and Liability Insurance Company*, 90 Fed. 2nd, 1, the court announced the rules that an injury is none the less compensable because pre-existence of a diseased condition has made serious or fatal what would not otherwise have been so, and that damage or harm to the physical structure of the body need not be external or visible, nor must it be established by direct evidence, but may be established by circumstances pointing to internal rupture or physical disturbance with sufficient definiteness to support a reasonable common sense conclusion that harm has occurred. In *Federal Underwriters Exchange v. Polson*, 148 S.W. 2nd, 956, the court sustained a jury verdict based upon evidence showing that an employee sustained an injury to his heart on January 9, 1939, in pulling the lever on a boomer fastening down a chain on a truck. Said employee died from heart disease several months later, on August 9, 1939. The court, in holding that the evidence was sufficient, cited a number of well considered cases, and made it clear that the evidence was sufficient to uphold a recovery under the Texas Workmen's Compensation Law. In said case the Supreme Court of Texas recently dismissed the application for writ of error, holding that the judgment was correct. In *Southern Underwriters v. Hoopes, et al.*, 120 S.W. 2nd, 924, it appears that the appellant assumed almost the identical position assumed by the petitioner in the case at bar. In said case the deceased had a pre-existing diseased condition of his heart, and suffered a strain while lifting a sill.

The court held that the evidence was sufficient and the injury compensable. Referring to the argument advanced by the insurance company, the court uses the following significant language: "The argument * * * * though syllogistic and logical from the premises chosen, is inept in the selection of that foundation for it."

The Court of Civil Appeals at Texarkana, Texas in *Texas State Highway Department v. Butler, et al.*, 158 S. W. 2nd, 878, under date of February 5, 1942 held that in compensation proceeding against the State Highway Department, evidence that the death of the employee was caused by a heart injury while working at a road roller for the Department raised issues for the jury whether deceased sustained an accidental injury and whether such injury was a producing cause of his death. Said case appears directly in point with the case now before the court in that the evidence clearly shows a very similar situation. The employee complained of symptoms almost identical with those of which Mr. Massey complained. He sustained the injury on April 12, 1939. His death occurred on May 11, 1939. He suffered from sensations of indigestion and choking. The chief difference in the two cases seems to be that Mr. Butler was not shown to have engaged in any strenuous labor just prior to his death, whereas the evidence shows that Mr. Massey was engaged in the duties of his employment immediately prior to his death. Therefore while the legal principles applicable to the two cases are

the same, the facts are more strongly in favor of recovery by the claimants in this case than in the Butler case.

In *Texas Employers Insurance Association v. Shifflette*, 91 S.W. 2nd, 787, the court held that the question of whether an employee suffering from heart disease, who walked up four flights of stairs in the course of his employment when the elevator was not operating, who continued to work that day, and died during the following night, sustained a compensable injury which contributed to his death, was for the jury to decide.

Certainly the evidence in the case now before the court is of greater weight than the evidence in the case just above cited, as well as many of the other cases in which various courts have sustained a finding of compensable injury. Such cases clearly announce undeniable principles of law and justice. If such decisions are correct, and they are, *a fortiori* the evidence in this cause is more than sufficient to sustain the verdict of the jury, and the injury is compensable under the Workmen's Compensation Law of Texas. Because of the similarity in the questions involved and in the arguments advanced by the insurance company, it is desired to call attention to *Travelers Insurance Company v. Johnson, et al.*, 84 S.W. 2nd, 354, in which it was held that the evidence was sufficient to sustain a finding that the employee's death from rupture of an aneurysm of the aorta resulted from exertion in operating a large wrench in tightening cylinder heads, and not from a syphilitic condition, and hence was compensable. Much of the

same argument was there advanced on behalf of the insurance company in much the same manner as appears in the case now before the court. The court, after discussing the various arguments and evidence, stated: "It is seen that the evidence raised the issue submitted, and amply supports the findings of the jury." In *Texas Indemnity Insurance Company v. Staggs, et al.*, 134 S.W. 2nd, 1026, the court announces clearly the legal principles applicable to suits of this character, to the effect that compensation will not be denied, although injury may be aggravated or enhanced by the effect of disease existing at the time or afterwards occurring; that the purpose of the Workmen's Compensation Law is to extend compensation to employees injured in the course of employment without reference to the negligence of the employer, and stricter rule should not be applied in compensation cases for tracing results to causes than is appropriate in negligence cases; and that injuries suffered by an employee in the course of his employment, to be compensable, need not be the sole cause of disability or death, and compensation should not be denied when the injury causes disability or death not of itself but concurrently with another injury or cause.

Therefore it clearly appears that the evidence is amply sufficient to sustain the verdict of the jury in this cause, and that the petition for writ of certiorari should be in all things denied.

II.

The evidence of which complaint is made was admissible.

It is believed that the authorities heretofore cited, and the comments upon the evidence, taken in connection with a reference to the evidence itself, clearly demonstrates that the evidence with reference to what took place on August 31, 1939, and on the date when the cooler was fixed, was without doubt admissible. The arguments advanced appear to discuss the weight rather than the admissibility of said evidence. A jury is entitled to hear and consider all of the relevant evidence germane to the issues involved. Therefore any incident indicating to any extent that the deceased may have sustained an injury in the course of his employment which contributed to his death was admissible. Certainly the occurrences on the two occasions mentioned here offer evidence of injuries sustained by E. S. Massey in the course of his employment. The weight to be given that evidence was for the jury to determine. Therefore, it is the position of the respondents that said evidence was clearly admissible.

III.

No proper and timely objection was made to said evidence.

Even though we assume for the purpose of this argument that said evidence was not admissible, the record clearly discloses that no objection was entered at the time the evidence was offered. Surely a party who fails to object to

evidence at the time it is offered waives any right he may have had to object thereto, and can not thereafter be heard to argue that a case should be reversed on account of the admission of evidence to which he had made no objection.

CONCLUSION

Let it be recalled that following the occurrences of August 31, 1939 and the occasion on which the cooler was fixed, Mr. Massey suffered great discomfort and uneasiness; that his first known heart attack followed immediately the circumstances occurring on August 31, 1939; that the work in which he was engaged on the day the cooler was fixed was immediately followed by exhaustion, pain and discomfort; that the strenuous work and long hours, together with the attending circumstances, occurring on November 28, 1939 and November 29, 1939 were almost immediately followed by death; and that the principles applicable to the facts of this case have been repeatedly and clearly announced by the courts.

It is noted that Rule 38, section 5, provides: "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." One of the reasons mentioned is where there exists conflict between decisions of Circuit Courts of Appeal. No conflict exists here, and all the decisions are in perfect harmony and complete accord on the questions involved in this cause. As aptly and clearly pointed out in the opinion of the Circuit

Court of Appeals (See 123 Fed. 2nd, 449): "The authorities on which appellant relies are not in conflict with these. They present cases of the application of the principle to facts which did not make out a case for recovery. Appellant's argument seems to be very much like that which was advanced, but did not prevail, in the Brodtmann case, supra, that there must be direct evidence that the death was caused by, that is, connecting the death with, a particular exertion or activity. This will not do. It is sufficient if taking all the facts and circumstances, there is a reasonable basis for the conclusion that in the course of his employment, there was an exertion, the accidental and unlooked for result of which was a physical injury to his heart causing its failure and his death." To the same effect are the other authorities cited herein, and the courts of the United States and of the State of Texas have consistently followed the rule thus laid down. We know of no authority to the contrary, and none that in any way conflicts with the above holding.

Wherefore respondents respectfully pray the Court that the petition for writ of certiorari be in all things denied.

Respectfully submitted,

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